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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 120

R. Q. BLACK, DOING BUSINESS AS SUPERIOR TRUCK-
ING COMPANY, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT*

**BRIEF FOR THE INTERSTATE COMMERCE COMMIS-
SION IN OPPOSITION**

OPINIONS BELOW

The District Court's opinion (R. 123) is unreported. The opinion of the Circuit Court of Appeals (R. 135) appears at 167 F. 2d 825.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 12, 1948 (R. 139). The petition for certiorari was filed on June 25, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended (28 U.S.C. 347(a)).

QUESTIONS PRESENTED

1. Whether the certificate authorizing petitioner to operate as a motor carrier carrying "machinery and machinery parts" permitted petitioner to transport automobile parts.

2. Whether the trial court erred in admitting testimony of expert witnesses that the words "machinery and machinery parts" as used in the motor transportation industry did not include automobile parts.

STATUTES INVOLVED

Section 222(b) of Part II of the Interstate Commerce Act, as amended (49 U.S.C. 322(b)), is set forth in the Appendix, *infra*, p. 8.

STATEMENT

The Interstate Commerce Commission, by suit instituted in the United States District Court for the Northern District of Georgia under the provisions of Section 222(b) of the Interstate Commerce Act (49 U.S.C. 322(b)), sought an injunction to restrain the petitioner, a common carrier by motor vehicle, from violating the terms of his operating authority.

Petitioner, under a valid "grandfather" certificate acquired by purchase, was authorized to transport "machinery and machinery parts, road construction machinery, contractor's equipment, structural and reinforcing steel, and commodities requiring special equipment" (R. 14). In fact he transported, and by tariff held himself out to trans-

port, automobile parts, accessories and supplies (R. 21, 23, 55). Witnesses experienced in the industry testified that "machinery and machinery parts" was not regarded as including automobile parts (R. 73, 75, 97). On these undisputed facts, the single issue was whether or not such transportation was within the scope of his operating authority.

ARGUMENT

Whether petitioner transported commodities not authorized by his certificate is a narrow factual issue raising no questions of law of general interest. There is no conflict of decisions, and the case is clearly not one for certiorari.

The basic error underlying all the reasons relied upon by petitioner for granting the writ is his assertion that the decision below has modified or altered his existing operating rights. From that premise he contends that the decision runs counter to the Commission's own holdings and thus jeopardizes all "grandfather" certificates; that it confers upon the courts power to determine the nature and extent of "grandfather" rights, a power of review in excess of that granted the courts under the Urgent Deficiencies Act, 28 U.S.C. 47. But no question of modification or alteration of the terms of the petitioner's certificate was involved, and no change was made in the express language employed in describing his operating rights. The question was, what rights had been given peti-

tioner, and not whether rights which had been given should be taken away from him.

The courts below did not, as petitioner suggests, weigh the evidence as to "grandfather" operations in order to determine the scope of the certificate as condemned in *Loving v. United States*, 32 F. Supp. 464 (W. D. Okla.), affirmed, 310 U. S. 609; nor did it attempt to "atomize" the petitioner's prior service, product by product, so as to restrict the scope of his operations, contrary to *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475. The issue presented does not fall within the doctrine of *United States v. Seatrain Lines, Inc.*, 329 U. S. 424. There this Court condemned the modification of a certificate issued to a *water* carrier, because, unlike the case of *motor* carriers, there was no authorization by Congress of such procedure. But in that case there was no question as to the scope of the original certificate. The decision specifically pointed out that (p. 429) "prior to and at the time of the issuance of the Seatrain certificate it was the understanding of Seatrain and the Commission that its transportation of 'commodities generally' included carriage of freight cars and that carriage of freight cars would not exclude carriage of commodities generally." Each of the cases cited was an action to review a Commission order. This is a suit to restrain violation of an order, and in such a proceeding it is obviously necessary and proper for the enforcing

court to determine what the order means in deciding whether it was violated.

Contrary to the situation dealt with in the *Seatrain* case the petitioner's certificate did not authorize the transportation of general commodities. His was a limited certificate. He was authorized to carry (1) machinery and machinery parts, (2) road construction machinery, (3) contractor's equipment, (4) structural and reinforcing steel, and (5) commodities requiring special equipment. Under this grant the petitioner claimed the right to haul anything that was a machine, from automobiles to wrist watches (R. 114, 115). But obviously if this were true it would have been superfluous to specify commodities enumerated in subsequent categories of the certificate. Plaintiff established by the clear and uncontradicted testimony of an expert on terms used in the motor carrier industry that the term "machinery and machinery parts" was not all-inclusive, and that it did not include automobile parts and accessories (R. 74-75). This evidence was clearly admissible for the reasons stated below (R. 138). Its admissibility would not, in any event, present a question for review by this Court.

In further clarification of the scope of the authority granted, it was shown that the "grandfather" operations to which petitioner had succeeded had not included the transportation of automobile parts and accessories (R. 93-97). Under the authorities

this evidence was competent to aid in interpreting the scope of the authority granted. For "grandfather" certificates are intended to establish "substantial parity" between a carrier's authorized operation and his actual bona fide transportation service during the "grandfather" period. *Alton R. Co. v. United States*, 315 U. S. 15, 22; *United States v. Carolina Carriers Corp.*, 315 U. S. 475, 481.

In this perspective petitioner's contentions do not provide any substantial basis for review on writ of certiorari. It might be suggested that the petitioner here had endeavored to enlarge his operating rights by a specious interpretation of a "grandfather" certificate. It is significant that he not only transported automobile parts and accessories but also automobile supplies such as wood alcohol, polishing compounds and anti-freeze preparations. Counsel for petitioner at the trial admitted that the certificate did not include the right to transport such automobile supplies (R. 55).

Finally petitioner asserts that the decision of the Circuit Court of Appeals deprives him of his property without due process of law. The short answer to this contention is that he cannot be deprived of something he never had.

CONCLUSION

The decision of the court below is correct, and there is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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AUGUST 1948.

APPENDIX

Sec. 222(b) of Part II of the Interstate Commerce Act, as amended:

If any motor carrier or broker operates in violation of any provision of this part (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to the district court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this part, or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees, and representatives from further violation of such provision of this part or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto.